BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LEONA D. SNAVELY	)	
Claimant	)	
VS.	)	
	)	Docket No. 214,057
PRESTIGE, INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Brad E. Avery on November 13, 1998. The Appeals Board heard oral argument June 23, 1999.

APPEARANCES

John J. Bryan of Topeka, Kansas, appeared on behalf of claimant. Maureen T. Shine of Overland Park, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge found claimant to be 100 percent permanently partially disabled after finding both a 100 percent wage loss and a 100 percent task loss. K.S.A. 44-510e. In so finding, the ALJ relied on the task list prepared by Mr. Bud Langston and the task loss opinion of Dr. Daniel D. Zimmerman. On appeal, respondent argues the ALJ should also have considered the task list prepared by respondent's expert, Mr. Gary Weimholt, and Dr. Mark Bernhardt's task loss opinion based on that list.

In addition, respondent contends claimant failed to make a good faith effort to find employment after her unemployment compensation ended and, for that reason, a reasonable post-injury wage must be imputed to claimant in calculating the wage loss.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be modified to a 57.5 percent permanent partial general disability based on a work disability of 75.5 percent reduced by 18 percent for preexisting disability.

Findings of Fact

1. Claimant worked for respondent as an over-the-road truck driver.

2. On July 26, 1995, claimant injured her low back while pushing cabinets out the back of a trailer.

3. Claimant had four back surgeries before the current accident.

4. As a result of this injury, claimant has been unable to return to work for respondent and has not earned a wage which is 90 percent or more of her preinjury wage.

5. The Board finds that as a result of this injury claimant is no longer able to perform 51 percent of the tasks she had performed in the work she had done during the 15 years prior to this injury. This finding is based on the opinions of both Dr. Bernhardt and Dr. Zimmerman, the two physicians who testified in this case. Both gave opinions based on task lists prepared by Mr. Bud Langston and Mr. Gary Weimholt. The task list prepared by Mr. Langston separated 4 jobs—school bus driver, truck driving school instructor, security guard, and truck driver—into 10 tasks. The list prepared by Mr. Weimholt broke the same 4 jobs into 26 tasks. The ALJ did not consider opinions based on the task list prepared by Mr. Weimholt because he believed the list was inflated, dividing some tasks claimant might be able to perform into several smaller tasks, to achieve a lower percentage of task loss. From review of the list, the Board agrees the list is inflated. But, in our view, the list prepared by Mr. Langston is too general and the number of tasks too few. It produced the opinion from Dr. Zimmerman that claimant cannot do any of the tasks. This conclusion, in our view, inflates the task loss. We conclude in this case it is appropriate to give equal weight to the opinions based on both task lists.

The ALJ also did not give weight to the task opinions of Dr. Bernhardt in part because he did not give specific restrictions. He only advised that claimant should allow the pain to determine what she could and could not do. But Dr. Bernhardt also reviewed the task lists of both Mr. Langston and Mr. Weimholt and provided his opinion about which

claimant could still perform and which she could not. The Board concludes the opinions of Dr. Bernhardt should be given equal weight.

Dr. Bernhardt concluded claimant cannot do 2 of the 26 tasks (8 percent) listed by Mr. Weimholt and cannot do 1 of the 10 tasks (10 percent) listed by Mr. Langston. Dr. Zimmerman, on the other hand, concluded claimant cannot do 22 of the 26 (85 percent) of the tasks listed by Weimholt.[1] Dr. Zimmerman opined that claimant cannot do 10 out of the 10 tasks (100 percent) listed by Mr. Langston. Giving equal weight to the opinions, the Board finds claimant lost the ability to perform 51 percent of the tasks.

6. The Board finds claimant did make a good faith effort to find work after the injury. Claimant received temporary total disability benefits from July 30, 1995, to January 28, 1996. She received unemployment compensation from June 15, 1996, to January 1997. Respondent does not dispute the good faith during the period of temporary total disability or unemployment compensation, but does argue that claimant did not make a good faith effort after the unemployment compensation ceased. Although claimant had difficulty giving specifics, claimant testified she had applied at some 40 to 50 places. While living in Neodesha she did not apply in Bartlesville, Oklahoma. Claimant moved to near Columbia, Missouri, approximately one month before the regular hearing and had not applied in Columbia because she was unpacking. She testified she intended to do so. Although the Board agrees the effort might have been greater, the Board also agrees with the finding by the ALJ that claimant made a good faith effort.

7. The Board finds claimant had an 18 percent disability based on functional impairment before the injury in this case. This conclusion is based on the opinions of Dr. Zimmerman who testified claimant had a 16 percent preexisting functional impairment and Dr. Bernhardt who testified claimant's preexisting impairment was 20 percent of the whole body. The record contains no evidence indicating preexisting work restrictions or physician opinions regarding which tasks were eliminated before the current injury.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

2. K.S.A. 44-510e(a) defines work disability as the average of the wage loss and task loss:

[1] Dr. Zimmerman gave indefinite answers regarding some tasks. Because claimant has the burden of proof, the Board has considered as tasks claimant cannot do only those tasks where Dr. Zimmerman gave a clear opinion.

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

3. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn. *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

4. Since claimant is not earning a wage, in spite of her good faith effort, she is entitled to a 100 percent wage loss.

5. Averaging a 51 percent task loss and a 100 percent wage loss, claimant has a 75.5 percent work disability. K.S.A. 44-510e(a).

6. K.S.A. 44-501 provides that the disability awarded must be reduced by the extent of any preexisting functional impairment:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

7. When the preexisting disability of 18 percent is deducted from the 75.5 percent work disability, claimant is entitled to benefits for a 57.5 percent general disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Brad E. Avery on November 13, 1998, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Leona D.

Snavely, and against the respondent, Prestige, Inc., and its insurance carrier, Liberty Mutual Insurance Co., for an accidental injury which occurred July 26, 1995, and based upon an average weekly wage of $739.75, for 71 weeks of temporary total disability compensation at the rate of $326 per week or $23,146, followed by 206.43 weeks at the rate of $326 per week or $67,296.18, for a 57.5% permanent partial disability, making a total award of $90,442.18.

As of July 30, 1999, there is due and owing claimant 71 weeks of temporary total disability compensation at the rate of $326 per week or $23,146, followed by 138.29 weeks of permanent partial disability compensation at the rate of $326 per week in the sum of $45,082.54, for a total of $68,228.54 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $22,213.64 is to be paid for 68.14 weeks at the rate of $326 per week, until fully paid or further order of the Director.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of July 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, KS
Maureen T. Shine, Overland Park, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director